Supreme Court, U. S.
FILED
FEB 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1230

HUBERT MORELOCK, EUGENE BORGERDING, WILLIAM EVANS, CLAYTON METCALF, AND RALPH SAUNDERS

Petitioners,

vs.

THE NCR CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 5, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Hubert Morelock, Eugene F. Borgerding, William O. Evans, Clayton Metcalf and Ralph B. Saunders respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on October 6, 1978.

REPORTS OF THE OPINIONS IN THE COURTS BELOW

The earlier opinion of this Supreme Court granting Writ of Certiorari and remanding this case to the Sixth Circuit (Mar. 6, 1978) was reported at 435 U.S. 911 and appears in the Appendix, at page 22a.

The most recent decisions of the Sixth Circuit Court of Appeals (Oct. 6, 1978) affirming Judgment n.o.v. (App. 2a to 21a), and denying the petition for rehearing (Nov. 9,

1978) (App. 1a) have not been reported but appear in the Appendix as herein noted.

The decisions of the District Court for the Southern District of Ohio have not been reported, but appear in the Appendix, infra. App. 23a to 25a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 6, 1978 affirming the District Court's grant of Judgment Notwithstanding the Verdict entered April 16, 1975. A timely petition for rehearing en banc was denied on November 9, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the *McDonnell Douglas* test of a prima facie case should be applied in ruling upon motion for judgment notwithstanding the verdict of a jury in a private civil action under the Age Discrimination in Employment Act.

2. Whether statistical evidence may serve as a means of establishing a prima facie case of age discrimination in employment.

3. Whether a simplistic "substantial evidence" formulation of the test to be applied in ruling upon motion for judgment n.o.v., suffers abridgement of the right to jury trial pursuant to the now-determined Congressional intention that jury trial be afforded in private age discrimination suits[1] and as guaranteed by the Seventh Amendment to the Constitution.

4. Whether upon the presentation of a prima facie case of employment discrimination there occurs a shifting of the

[1] See *Lorillard* v. *Pons* 434 U.S. at 575 1978.

burden of production of the evidence or whether there occurs instead a shifting to the employer of the burden of persuasion either generally or as to any affirmative defenses.

5. Whether a searching of the record for conflicting circumstantial evidence, or a preoccupation with the movant's evidence upon reviewing a judgment n.o.v., suffers abridgement of right of jury trial under the A.D.E.A. and as guaranteed by the Seventh Amendment to the Constitution.

6. Whether the decision below affirming judgment n.o.v. was clearly erroneous.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

The Age Discrimination In Employment Act, United States Code, Title 29: Sec. 621 (b)

> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; . . ."

Sec. 623 Prohibition of age discrimination – Employer practices

"(a) It shall be unlawful for an employer–

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's age; and

(2) to limit, segregate; or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of such individual's age; . . ."

"(f) It shall not be unlawful for an employer . . .

(2) to observe the terms of a bona fide seniority system, . . . which is not a subterfuge to evade the purposes of this chapter . . . ."

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance, the U. S. District Court for the Southern District of Ohio, was the existence of questions which arose under a law relating to interstate commerce, the Age Discrimination in Employment Act 29 U.S.C., Sec. 621 et seq. and pursuant to 28 U.S.C. Sec. 1331.

These actions were brought under the A.D.E.A. by five employees to recover as individually applicable, lost wages, damages for mental anguish and personal injuries sustained, punitive damages, liquidated damages, injunctive relief, reinstatement, attorney fees, and costs.

The first stage of the bi-furcated trial concluded when individual verdicts were returned by the jury on the fifth day of trial, finding the sole submitted issue of age discrimination liability in favor of the petitioners and against the respondent.

The Trial Court thereafter overturned the jury's five verdicts of liability and granted the respondent both judgment notwithstanding the verdicts and a conditional order of new trial in the event the judgment n.o.v. were not sustained on appeal (App. 24a-25a). The Trial Court declined to explain the basis of the grant of judgment n.o.v.

The Court of Appeals first affirmed the judgment n.o.v. by declaring the jury verdicts of no consequence as being the work on an "advisory jury" only, decreeing the issues which were tried in the case to have been "equitable in nature, directly analagous to the equitable issues pursued in actions under 29 U.S.C. Sec. 217 and 42 U.S.C. Sec. 2000e-5, and not suitable for trial by jury." *Morelock* v. *NCR*, 546 F.2d 682.

Remand was however, ordered to the District Court for findings of fact and conclusions of law.[2]

The U. S. Supreme Court granted Writ of Certiorari, vacated the Sixth Circuit's judgment and remanded the case for further consideration in light of *Lorillard* v. *Pons*, 434 U.S. 575, which had found a right to a trial by jury in a private civil action under the A.D.E.A.

Upon remand, the Sixth Circuit affirmed the grant of judgment n.o.v. and thereafter denied petition for rehearing en banc.

By 1971 each of the five petitioners were long term employees of the respondent, each having worked for NCR at its Dayton, Ohio facilities well in excess of 20 years, each being at that time over 40 years of age, yet under age 65.

Although each of the petitioners began their NCR employment doing work other than in the field of electronics, they each availed themselves of extended coursework and night classroom study and eventually thereby were able to secure entry to work as electronic product development technicians. Their transition from mechanical skills to skills in the field of electronics was in keeping with the same grad-

[2] Upon subsequent remand from the Supreme Court, the Sixth Circuit ruled that findings of fact and conclusions of law were no longer required of the District Court in light of the jury's change in status from an advisory body to a jury of right. (App. 5a)

ual transition within respondent's product lines to electronic cash registers, computers and other electronic business machines as was also witnessed throughout that industry beginning in the early 1950's.

The petitioners were classified by the respondent immediately prior to the complained-of discrimination as "Senior Development Electronic Technicians" assisting in the development of new electronic products by creating working models, or prototypes from the paperwork designs and calculations of the respondent's electronic theorists and designers.

Over the years, the respondent had developed groupings of vocations, wherein an employee was promoted and expected to progress from the lower to the higher vocations within the same "family of vocations" as he gained experience and greater skill. As applied to these petitioners, and once the vocation nomenclature had been established, an inexperienced worker could be expected to progress from the "lab aid" vocation to the "junior electronic development technician" vocation and ultimately to the "senior electronic development technician" vocation.

The petitioners were part of the "office and technical" group which ceased to have any recognized bargaining agent following a decertification of the former independent union in 1971.

Employment levels at the respondent's Dayton facilities fell drastically during the early 1970's from a peak of approximately 21,000 to around 8000 at the time of trial, March 1975. Those reductions in the workforce were occasioned in part as result of the implementation of a plan of decentralization adopted in the mid 1960's and in part as result of the near total abandonment of the respondent's line of mechanical cash registers, this in keeping with the industry trend toward electronic machines.

The single classification of electronic development technicians which had existed prior to 1965 was then bisected

into two classifications: the senior development electronic technicians – having the higher skill level by job description – and the junior development electronic technicians. See Ex. 20 and 21, pages 26a-30a of Appendix hereto.

As of 1971, a noticeable segregation of the older development electronic technicians apart from the younger technicians was statistically evident when 25 of the then 43 seniors were age 40 or above, while only 3 of the then 29 juniors had yet reached age 40. The "seniors" were on average, a full 10 years older than their "junior" counterparts. (R. 234, 339-41, 495.)

The 1965 bisecting of the development electronic technicians into two classes remained largely insignificant in terms of the employment opportunities extended to the older technicians by virtue of company rules in the seniority scheme whereunder a senior technician displaced by a work force reduction could displace in turn a junior technician with less years with the company.

In 1968, however, that latter provision was eliminated thereby serving to completely isolate the older group from the employment opportunities extended to the younger group of technicians.

Following a device called "time-increment bumping," highly skilled senior technicians when displaced from such work as result of a work force reduction, were given assignments such as a xerox machine operator, in the case of petitioner Eugene Borgerding (R. 66), or that of a manual clerk, in the case of petitioner Hubert Morelock (R. 64), or as a mail sorter in the case of petitioner Ralph Saunders (R 68), which assignments were fully alien to their "family of vocations" and which work to them was understandably very demeaning and humiliating as well as financially unrewarding.

The illogical flow characteristic of time-increment bumping worked at odds with the employee's natural inclinations to gain advancement and promotion. A talented junior

technician when offered promotion to the senior ranks would decline in order to avoid his name being taken from a secure position near the top of the junior technician's listing to a most vulnerable place at the very bottom of the senior's seniority list. (R. 213, 294-95, 559-60)

As with most seniority systems, the skill of the employees, each as compared with the other, was totally aside and irrelevant to how the system operated to determine which employee stayed and which left. No evaluation of relative skill levels was at all involved.

By the end of the 1971-74 period, 38 of the original 43 senior technicians were no longer so employed while only 9 of the original 29 juniors encountered a similar fate. (R. 234, 268, 339, 340, 341 495)

	Senior Techs	Junior Techs
1971	43	29
1974	5	20

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals in Actions under the A.D.E.A. and in Turn Fails to Follow A Decision of This Supreme Court Establishing the Test to be Employed in Passing Upon the Issue of A Prima Facie Case of Employment Discrimination

This Sixth Circuit decision both failed to follow the Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 41 U.S. 792 (1973), and as well failed to offer any explanation for its avoidance.

That 1973 decision standardized the ingredients of a prima facie case in the Title VII, failure-to-hire setting. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

There being no discernible distinction to be drawn between race discrimination and age discrimination in employment, such as would otherwise render analogous *McDonnell Douglas* guidelines here inapplicable, a conflict between that Supreme Court decision and this Sixth Circuit case, thereby necessarily arises.

The evidence in this age discrimination case included proof that:

1. the petitioners were each over age 40, yet under age 65;
2. the petitioners were more than qualified to perform the work assigned to the less-skilled "junior technicians" who continued to retain work assignments as electronic technicians;
3. despite their excellent qualifications, three of the petitioners were demoted to humiliating and menial task assignments and the remaining two were on the very brink of encountering the same fate; and
4. following and throughout the demotions of the three petitioners, electronic technician assignments continued to be extended to numerous and less skilled "junior technicians," nearly all of which were under age 40.

The October 6th decision's non-mention of *McDonnell Douglas* implicitly admits that its terms and provisions were not applied.

This case of non-mention of the *McDonnell* guidelines follows an earlier decision of the same Sixth Circuit Court wherein doubt of their applicability was expressed: "While it may not be unreasonable to assume that in a proper case the guidelines established in *McDonnell Douglas* v. *Green* can be applied in age discrimination jury cases, we believe it would be inappropriate simply to borrow and apply them automatically." *Laugeson* v. *Anaconda*, 510 F. 2d 312 (Sixth Cir. 1975)

CONFLICT WITH THE CIRCUITS

A 1974 Fifth Circuit decision, *Wilson* v. *Sealtest Foods Division of Kraftco Corporation*, 501 F. 2d 84, 86, was followed by further holdings in that circuit confirming that the analogous *McDonnell* guidelines were to be applied to suits under the A.D.E.A. ". . . the four elements . . . (1. the employee's membership in the protected group; 2. his discharge; 3. his replacement with a person outside the protected group; 4. his ability to do the job.) . . . parallel the elements of the prima facie Title VII case discussed in *McDonnell Douglas*. . . . We have held that these elements constitute a prima facie A.D.E.A. case as well." *Marshall* v. *Goodyear Tire and Rubber Co.*, 554 F. 2d 730 (Fifth Cir. 1977), citing *Sealtest supra*, and *Lindsey* v. *Southwestern Bell Telephone Company*, 546 F. 2d 1112, 1124 (Fifth Cir. 1977).

A 1977 Eighth Circuit decision also found *McDonnell* applicable to A.D.E.A. suits: 'While the proof required for a prima facie case of discrimination will vary depending upon the specific factual situation, see *McDonnell* . . ., we find . . . no evidence that she was replaced by a younger person." *Moses* v. *Falstaff Brewing Corp.*, 550 F. 2d 1113 (Eighth Cir. 1977)

The First Circuit Court of Appeals both acknowledged and applied the *McDonnell Douglas* test in its review of a directed verdict in an age discrimination case:

> ". . . since this is a discrimination case, the shadow of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 5 FEP Cases 965 (1973) cannot be avoided. We therefore assume for purposes of this opinion, without so deciding, that the *McDonnell Douglas* test applies to age discrimination cases. It is clear that appellants have failed to make out a prima facie case under the *McDonnell Douglas* test because there is no evidence that they were qualified for work in the cargo department; the only evidence is that they were not qualified." *Landron Trinidad* v. *Pan Am. World Airways* (First Cir. A., May 1978), 17 FEP Cases 553, 555.

The plaintiffs in *Landron* had failed to meet a typing requirement of the job in the cargo department while in this case the plaintiffs had more than met the requirements of the "junior technician" classification. Their very classification as "senior techs" served as an admission of that fact pursuant to the company-devised job descriptions, Exhibits 20 and 21 at trial, see pages 26a-30a of the Appendix hereto. Those job descriptions required of the "senior techs" every skill of the "junior techs" plus a talent for creativity not required of the "junior techs."

The only evidence that even alluded to the notion that petitioners were not qualified to do the work of the junior techs under *McDonnell Douglas* was instead an admission of age-bias made by none less than the respondent's Director of Industrial Relations, who (in a fashion directly analogous to sex discrimination-weightlifting precedents) explained that the "seniors" had been segregated apart from the juniors for reason that the juniors:

> "would reflect a new expertise, a new skill, related but new, and a new technology *which the senior could not be expected to have.*" (R. 598)

See: *Bowe* v. *Colgate Palmolive Co.*, 416 F. 2d 711 (Seventh Cir. 1969)

The job descriptions (Exhibits 20 and 21, see pages 26a-30a of the Appendix hereto) of course made no concessions to age and instead required of the senior technicians a greater level of skill over that required of the "juniors." The intent underlaying the passage of the A.D.E.A. was "to ensure that hiring (and presumably employee retention) decisions are based on objective evaluations of individuals' potential for job performance, rather than on misconceptions about the effects of age on ability." 90 Harvard L.R. 380-81, citing 29 U.S.C. Sec. 621(b)(1970) and others.

Further, no evidence was presented nor did Respondent's counsel ever argue to the Court or jury that the thus-mouthed admission of age-prejudice by the Director of Industrial Re-

lations was somehow factually justified, such that the "seniors" were "not up with the times" or not as a group capable of executing the tasks assigned to the "junior technicians."

The Sixth Circuit's failure to apply the *McDonnell Douglas* test was no harmless omission as the record amply demonstrates that were the test instead to have been applied, a prima facie case indeed, would have been clearly found.

2. The Decision Below Conflicts with the Decisions of the Other Courts of Appeals In Age Discrimination In Employment Suits Which Decisions Approved The Use of Statistical Data To Establish A Prima Facie Case

The decision below is in direct conflict with the decisions of two other Circuit Courts of Appeal holding that a prima facie case of age discrimination in employment might well be made out by statistical evidence. See *Hodgson* v. *First Federal Savings and Loan Association,* 455 F. 2d 818, 823 (Fifth Cir. 1972), and *Marquez* v. *Omaha Dist. Sales Office,* 440 F. 2d 1157, 1160-61 (Eighth Cir. 1971).

Likewise, the decision below is in conflict with the decisions of other Circuits consistently holding in Title VII litigation that discrimination in employment procedures may be established by statistical data. See *United States* v. *N.L. Indus., Inc.* 479 F. 2d 354 (Eighth Cir. 1973); *United States* v. *Wood, Wire and Metal Lathers Int'l Union,* 471 F. 2d 408 (Second Cir. 1973); *Parham* v. *Southwestern Bell Tel. Co.,* 433 F. 2d 421 (Eighth Cir. 1970).

The October 6th, 1978 decision dismisses the statistical evidence presented at trial in the following fashion: "We do not believe that the number of senior techs laid off is so excessive in comparison with the number of junior techs laid off as to conclude that NCR, is laying off its electronic technicians,

was discriminating on the basis of age." *Morelock* v. *NCR Corp.* (App. 21a herein).

This language at first blush leads us to believe that the reviewing court acknowledged the role of statistical evidence but simply found plaintiffs' statistics, insignificant or not revealing any "marked disparity."

That inference however must surely fail in light of the overwhelming import of the statistics themselves such that four seniors were deprived of employment as electronic development technicians for every one of the juniors. (R. 234, 268, 339, 340, 341, 495) The significance of those statistics was underscored by the evidence that all the while (1970-1974) the respondent was discarding the more skilled technicians at a ratio of 4 to 1 over the less skilled (Exhibit 20 and 21, App. 26a-30a to this Petition), this same employer was in process of converting its product lines from mechanical to electronic business machines and thus the need for the greatest skill among its electronic development technicians was at its peak.

The only remaining reasonable conclusions with which we are left, therefore are either, that the Sixth Circuit has jettisoned statistical evidence "in toto" as a means of establishing a prima facie case, — thereby creating a conflict among the Circuit Courts — or has applied an inappropriate judicial role in weighing such statistical evidence when determining "significance" or "marked disparity." (See Reasons for Granting the Writ No. 3, p. 14 of this Petition).

3. The Decision Below Conflicts with the Decisions of Other Courts of Appeals And With The Decisions of The Supreme Court as to the Proper and Constitutional Standard To Be Applied In Ruling Upon Motion For Judgment N.O.V.

After extending briefing prior to the decision granting judgment n.o.v., the Trial Court overtly opted for an evidence-weighing and simplistic "substantial evidence" formulation of the standard to be judicially applied. See p. 24a of Appendix hereto.

Upon its October 6th, 1978 (and second) review, quoting "a leading authority on federal civil procedure . . ." the Sixth Circuit observed in effect that it makes no differences as to what formulation of the test is employed: "'Although . . . courts have used other phrases than the one preferred here (namely, the reasonable minds test) to describe the standard of sufficiency of evidence, it is unlikely that there is any real difference in result' . . . and in view of the fact that there is no evidence on the record which indicates that the trial judge weighed the evidence, we find no prejudicial error." See p. 15a of Appendix hereto.

Of course, there was no evidence on the record which indicated at all what the trial judge did, that being the basis for the first Sixth Circuit panel's decision (December 20, 1976) to remand the case for the Trial Courts findings of fact and conclusions of law. 546 F.2d 682.

Although observing in a footnote to the October 6th, 1978 decision ". . . it is the better practice in cases such as the instant case, in which the facts are complex, for a trial court to delineate with specificity its reasons for the grant of judgment n.o.v. rather than merely stating conclusively, as did the District Court here, that there was no substantial evidence to support the jury's verdict. . . ." (App. p. 5a), the appellate court was content to rest upon the totally ambiguous silence of the record to surmise that the Trial Court had done nothing wrong, and further relied upon Rule 52 to overturn the remand

order previously issued to the Trial Court, in the December 20th, 1976 decision.

We submit that the verbal formulation employed can well make a difference to the result, hence Judge Rives' observation: ". . . I note that, notwithstanding all the variations which the Supreme Court has played on its sufficiency theme, I have been unable to find a single instance in which the Supreme Court has used 'substantial' in any of its aritculations of the constitutional standard." *Boeing Co.* v. *Shipman*, 411 F. 2d 365, 393-94 (Fifth Cir. 1969).

The observation by the treatise write that the word "substantial" when infused within the reasonable minds test, doubtfully "adds anything of value," misses the crucial point that its infusion suffers the grave risk of an unconstitutional quantitative weighing of the evidence by the judge. Moreover in this case, it was no infusion within the reasonable minds test but rather a naked and simplistic "substantial evidence" test that was employed by the Trial Court. See p. 24a of Appendix hereto.

The use of that simplistic test having now been confirmed by this decision of the Sixth Circuit Court of Appeals, surely stands in conflict with the decisions of other circuits and those of this Supreme Court. *Sentilles* v. *Inter-Caribbena Shipping Corp.*, 361 U.S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173; *Giodano* v. *Lee*, 434 F. 2d 1227, 1231 (Eighth Cir. 1970); *Taylor* v. *National Trailer Convoy Inc.*, 433 F. 2d 569, 571-72.

4. The Decision Below, While Consistent With An Earlier Decision In The Same Circuit, Conflicts With The Decisions of Other Courts of Appeals as to Whether The Burden of Persuasion Shifts to the Employer Upon A Showing Of A Prima Facie Case Of Employment Discrimination

Although assigned as error and briefed to the Court below, no mention was made of the petitioners' 10th Argument on appeal which bore upon the burden of persuasion subsequent to the presentation of a prima facie case.

The tone of the Circuit Court's discussion of the bona fide seniority system defense without reference to its "affirmative" character and the otherwise omission of any direct reference to this issue in the October 6, 1978 decision sustaining judgment n.o.v. (App. 2a-21a) prompts our inference that the Sixth Circuit thereby has continued to hold to its rule announced in *Long* v. *Ford Motor Co.*, 496 F. 2d 500, 505-506 (Sixth Cir. 1974). That case held that only the burden of production or the burden of "articulation" of an affirmative defense befalls an employer in the wake of a prima facie case.

However, ". . . In general the federal courts of appeals which have considered this issue have interpreted (*McDonnell Douglas v.*) *Green* . . . as shifting the entire burden of persuasion to the defendant once the prima facie showing is made." 90 Harvard Law Review 380, 389 citing *Rodriguez* v. *East Texas Motor Frt.*, 505 F. 2d 40, 58 (Fifth Cir. 1974); *Vulcan Society of the New York City Fire Dept.* v. *Civil Service Commission*, 490 F. 2d 387, 393 (Second Cir. 1973); *Holthous* v. *Compton and Sons*, 514 F. 2d 651 (Eighth Cir. 1975); *Gates* v. *Georgia Pac.* 492 F. 2d 292, 295-96 (Ninth Cir. 1974).

See also the discussion in 90 Harvard L.R. 380, 392 wherein the ". . . justifications put forth by the *Laugeson* court for imposing a different burden of proof in A.D.E.A. cases than in Title VII actions . . . were found to be not persuasive."

5. The Decision Below Conflicts With The Decisions Of The Supreme Court As To The General Standard To Be Employed When Passing Upon The Sufficiency Of Evidence To Create A Jury Issue In Civil Litigation Arising Under Federal Law

In reaching its conclusion affirming judgment n.o.v., the Sixth Circuit Court of Appeals plainly and openly "searched the record for conflicting circumstantial evidence . . . on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . .", this in plain conflict with the Supreme Court's decision in *Tennant* v. *Peoria and P.U. Ry. Co.*, 64 S. Ct. 409, 412, 321 U.S. 29, 35, 88 L. Ed. 520 (1944).

See also *Lavender* v. *Kurn*, 66 S. Ct. 740, 327 U.S. 645, 90 L. Ed. 916 (1946), holding that ". . . only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

Likewise the October 6th, 1978 decision abandons the rule announced in *Wilkerson*: ". . . we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Wilkerson* v. *McCarthy*, 69 S. Ct. 413, 415, 336 U.S. 53, 57, 93 L. Ed. 497 (1949).

The October 6th decision simply bores upon those statistics and pieces of evidence which tended to support the respondent, either ignoring entirely the petitioners' evidence, or placing a strained interpretation thereon or deriving an inference contrary to discrimination. See pp. 17a-19a to Appendix hereto.

This case arises under the A.D.E.A., and therefore should be ruled by the same standards applicable to F.E.L.A. and Jones Act cases. If not, then the observation that ". . . A decision by the Supreme Court, clearly stating which view it takes as to the scope of the F.E.L.A. and Jones Act decisions, would be of helpful guidance to the lower courts. . . ." is, here applicable. See *Boeing Co.* v. *Shipman*, 411 F. 2d 365, 373 n. 10, (Fifth Cir. 1969).

Thus the decision below chronicles ". . . there were persons in each vocation who were under the age of forty, as well as those who were forty years of age and older" (App. p. 19a). Notably missing were the statistics adduced by petitioners showing that as of 1971 the ranks of the senior techs (25 of 43) were filled with technicians age 40 or above at a ratio nearly 6 times that which applied in the ranks of the junior techs (3 of 29). R. 234, 268, 339, 340, 341, 495.

Thus, the decision below chronicles "that the motive for the creation of two electronic technicians vocations was economic, that is, to permit NCR to hire inexperienced technicians at a lower salary than that paid to experienced electronic technicians. . . ." (App. p. 17a) Notably missing is any mention of the statement of the Director of Industrial Relations who had explained the segregation of the seniors apart from the juniors because the seniors ". . . could not be expected to have . . . the new expertise, new skills, and the new technology of the junior techs." R. 598

6. The Decisions Below Entering And Then Affirming Judgment N.O.V. Were Clearly Erroneous As A Matter Of Law

A stipulation entered by the parties at trial was given a near controlling thrust and construction by the decision below:

> "'. . . the following employees with the noted seniority and birthdates having been reduced from such vocation during this period due to lack of work within such vocation. (emphasis added)' A party is bound by what he stipulates. The above stipulation gives the reason why plaintiffs were laid off, namely, there was no work for senior techs. This stipulation in our opinion, should preclude the plaintiffs from claiming that they were laid off for any other reason." See p. 21a of Appendix hereto.

This above construction placed upon the stipulation is founded upon a most essential misperception of the petitioners' grievance presented at trial, and is further totally novel to this case, first appearing in print to our knowledge only in the October 6th, 1978 decision. It surely was not the meaning intended by the petitioners nor the meaning understood or taken by the Trial Court nor even a meaning which occurred to the respondent throughout the entire proceedings before the Trial Court.

Instead, we submit that this stipulation was simply the result of an acknowledgment by these petitioners that product development and work assignment decisions were matters reserved within the exclusive province of management under the terms of the expired but, then-applied 1968 contract. Thus it made little sense for these petitioners to substantially lengthen the trial in order to debate that the remaining electronic development tasks required the higher level of skills possessed by the senior technicians, or to debate the respondent's decision that a once-planned future product line should not have been abandoned, or should not have been shifted and reassigned for development to another of the respondent's plants. Neither were petitioners inclined to debate that there had in fact occurred a generalized reduction in the level of employment at the respondent's Dayton facilities.

Of most significance here, however, these petitioners based their claim in this case not upon the employer's act of demoting them *from* the Senior Development Technician vocation – the sole matter addressed in the stipulation – but instead, to the respondent's act of assigning the plaintiffs *to* humiliating, menial and totally unrelated work assignments; to the respondent's act of *segregating the seniors apart* from the juniors; and to the respondent's omission in *not considering them* for the electronic development technician's work, albeit at that lower rate of pay, which work the employer continued to extend to the "junior techs."[3]

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[3] Petitioner's statement of the "general nature of their claims" as embodied in the Final Pretrial Order made no mention of the demotions

Not at trial, nor during the proceedings on directed verdict and judgment n.o.v., nor to our reading within the memoranda and briefs submitted to the Circuit Court prior to the Supreme Court's remand was such construction ever asserted by the respondent.

The doctrine of the Law of the Case should preclude this unwarranted torpoedoeing of the petitioners' action at this late moment in the proceedings. See 5 Am Jur. 2d, Appeal and Error Section X. Review, D. Law of the Case.

Further, the respondent is precluded from asserting this "stipulation" argument for the first time at the second oral argument and after remand from the Supreme Court since "a motion for judgment notwithstanding the verdict, like a motion for directed verdict, must state the grounds on which it was made. Since it is technically only a renewal of the motion for directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for directed verdict." 9 Wright and Miller, Federal Practice and Procedure sec. 2537, p. 598, citing *Arkwright Mut. Ins. Co.* v. *Philadelphia Elec. Co.*, 427 F. 2d 1273, 1274-75; *Lewis* v. *Mears*, 189 F. Supp. 503, affirmed 297 F. 2d 101 (Third Cir. 1961); and *Rothenberg* v. *H. Rothstein and Sons*, 9 F.R.D. 211, affirmed 183 F. 2d 524 (Third Cir. 1950).

The Trial Court meanwhile had apparently granted judgment n.o.v. upon an entirely different and equally unfounded premise, being that of "reverse discrimination."

The colloquy between the Court and petitioners' counsel at the time of respondent's motion for directed verdict (R-722-25) revealed the Court's concern over how a seniority system could ever be the instrument of discrimination against age and its corollary element "years of service" when it is the younger and least senior person on the list who must leave the employ first.

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from the Senior Technician vocation and instead alleged "that the Defendant has limited, segregated or classified its employees in a way which deprives or tends to deprive Plaintiffs of employment opportunities . . ." R. 62

Likewise the only hint of any basis for the grant of judgment n.o.v. appearing in the Trial Court's written order was stated as follows:

> ". . . three of the plaintiffs . . . were reduced in grade *in reverse order* of seniority during a reduction in force at defendant's plant." (emp. add.) See p. 25a of Appendix to this petition

Although submitted and argued to the Sixth Circuit, no mention of that most-apparent basis for the Trial Court's action, was ever made by the Sixth Circuit's October 6, 1978 decision.

The fallacy in such reverse discrimination theory lies in an essential element of discrimination law, namely that the differences between members of two classes, treated differently in terms of employment opportunities extended them as result of their classifications, must be substantial and relevant to that use to which the classification system is applied.

Here, the only difference – aside from age and years service – between the seniors and junior techs, to wit, a higher level of skill possessed by the former, was plainly irrelevant to the use to which the classifications were used, i.e. to restrict and limit job opportunities of the seniors in favor of the younger workers.

Under the mandate of the A.D.E.A., the Courts should indeed look closely at the lines drawn between older and younger workers by seniority system classifications. Once established and commissioned for that duty, employment opportunities are either denied or extended pursuant to those classifications in a manner totally aside from the merits and relative skills of the individuals.

This issue which bears directly upon the job security of thousands of older employees across this country, should more than provide the required element of importance so as to warrant the issuance of the petitioned Writ of Certiorari.

Finally, both the Trial Court as well as the Court of Ap-

peals failed to acknowledge the inferences fairly arising from petitioners' evidence presented at trial including:

1. the admission of age-prejudice by the Director of Industrial Relations, directly applied to the matter of these vocations. R. 598
2. respondent's concurrent practice of subjecting older workers upon attaining age 62 to a special scrutiny to determine their fitness for continued employment to age 65. R. 561-69
3. a wage trend line analysis (Ex. 22 at trial) and the job-evaluation expert testimony showing that during this same time-frame, the respondent was also administering a wage policy within the Office and Technical Unit, which compensated the older workers at a noticeably lower rate of payment per acknowledged unit of job worth as contrasted with the younger workers. R. 389-466.
4. statistical evidence of age-related groupings between the vocations and depletion of the ranks of the older group at a rate 4 times that experienced by the younger group. R. 233, 268, 339-41, 396, 495

A line of cases wherein lower courts had prevented or upset a jury verdict in civil proceedings under federal statutes, established an exception to the normal rule that certiorari is generally withheld when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved.

Thus, this 6th reason for granting the writ, alone constitutes an independent and ample cause for the issuance of the writ:

> ". . . the criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55.

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres* v. *Westover*, 359 U.S. 500, 501

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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February 5, 1979

APPENDIX A

Nos. 75-2220 & -2282

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUBERT MORELOCK, et al.,
Plaintiffs-Appellants,

v.

THE NCR CORPORATION,
Defendant-Appellee.

ORDER

(Filed November 9, 1978)

Before: WEICK, ENGEL and MERRITT, Circuit Judges.

No active Judge of this Court having requested that a vote be taken on the suggestion of the appellants that their petition for rehearing be heard en banc, said petition for rehearing was referred to the panel for disposition.

Upon consideration, we are of the view that our opinion in these appeals adequately discussed the issues, and that the petition for rehearing should be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN D. HEHMAN
Clerk.

APPENDIX B

No. 75-2220
No. 75-2282

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HUBERT MORELOCK, et al.,
Plaintiffs-Appellants,

v.

THE NCR CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed October 6, 1978.

Before: WEICK, ENGEL and MERRITT, Circuit Judges.

WEICK, Circuit Judge. This is a private action brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, against the NCR Corporation (NCR or "Company"). Plaintiffs, Hubert Morelock, William Evans, Eugene Borgerding, Clayton Metcalf and Ralph Saunders[1] are present or former employees of NCR at its Dayton, Ohio facilities who either lost their jobs or feared the loss of their jobs through a reduction in the work force at the Dayton facilities, which reduction commenced on October 13, 1972.

[1] In addition to the above persons, Edward Thompson was also originally a plaintiff in this action. In the Final Pretrial Order, he was dismissed as a party plaintiff.

In essence, they allege that NCR conducted its reduction in the work force pursuant to a seniority system which was not bona fide within the meaning of § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). They sought *inter alia*, back pay, damages, reinstatement and an injunction enjoining NCR from discriminating against them on the basis of their age.

The District Court denied NCR's motion to strike plaintiffs' demand for a jury trial and ordered the issue of liability to be tried to a jury. Before submitting the case to the jury, the Court reserved NCR's motion for a directed verdict. The jury returned a verdict in favor of each plaintiff. After the verdict was rendered, NCR renewed its motion for a directed verdict and also moved for judgment notwithstanding the verdict (n.o.v.) and in the alternative, for a new trial. The District Court granted the motion for judgment n.o.v. and conditionally granted the motion for a new trial in accordance with the provisions of Fed. R.Civ. Pro. 50(c).

Plaintiffs appealed, assigning as error *inter alia* the trial court's granting of NCR's motions for judgment n.o.v. and a new trial. NCR cross-appealed, raising the additional issues of (1) the propriety of a jury trial in a private civil action brought under the ADEA (2) whether plaintiffs' action was time-barred by the applicable statute of limitations and (3) whether each plaintiff was required to file a written consent to become a party plaintiff in the lawsuit, under the provisions of 29 U.S.C. § 256.[2]

[2] 29 U.S.C. § 256 provides in pertinent part:

> In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

The appeal was argued before a panel of this Court on June 16, 1976. In an opinion filed on December 20, 1976, we held that there was no right to a jury trial in a private action under the ADEA. See 546 F.2d 682. Consequently, we found that the jury empaneled by the District Court was in effect, an advisory jury, whose use did not relieve the District Court of its duty to make findings of fact and conclusions of law as required by Fed. R. Civ. Pro. 52. Because the District Court failed to do this, we vacated its judgment and remanded the case to the District Court for the entering of findings of fact and conclusions of law.[3]

Subsequently, plaintiffs filed with this Court a petition for rehearing, with a suggestion for a rehearing en banc. After our denial of that petition, plaintiffs petitioned the Supreme Court for a writ of certiorari.

On February 22, 1978, the Supreme Court announced its decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), which held that there is a right to a trial by jury in a private civil action for lost wages under the ADEA. The Supreme Court on March 6, 1978 vacated our judgment in the instant case and remanded the case to us for further consideration in light of *Lorillard* v. *Pons, supra*, 435 U.S. 911 (1978).[4]

Upon the remand to our Court, supplemental briefs were filed and the appeal was argued for a second time before a

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

[3] We indicated in our opinion that we would have decided the case on the merits had not the factual details of the appeal been so complex. *Id.* at 689 n. 19.

[4] In the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 § 4(a), 92 Stat. 190 (1978), Congress amended § 7(c) of the ADEA, 29 U.S.C. § 626(c) to provide for a "trial by jury of any issue of fact in [a private civil] action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action."

panel of this Court. By reason of the fact that the District Court tried the question of liability to a jury as required by *Lorillard* v. *Pons, supra*, we find that the issues raised by the parties are now ripe for disposition and accordingly, we reach the merits of this appeal.[5]

We hold that this action was timely commenced within the applicable limitations period and that plaintiffs were not required to file written consents to become parties to this action. Furthermore, we affirm the District Court's grant of judgment n.o.v. and therefore, we find it unnecessary to reach the questions raised by plaintiffs with respect to the District Court's conditional grant of a new trial.

[5] Throughout the postjudgment course of proceedings in this case, plaintiffs have repeatedly requested that the District Court be required to render findings of fact and conclusions of law with respect to the grant of judgment n.o.v. Without such findings and conclusions, plaintiffs assert that neither they nor this Court can appraise adequately the properiety of such an order.

Fed. R. Civ. Pro. 52(a) requires findings of fact and conclusions of law to be made in "[i]n all actions tried upon the facts without a jury or with an advisory jury" and "in granting or refusing interlocutory injunctions." The Rule further provides that findings of fact and conclusions of law "are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." An order granting judgment n.o.v. is not an order in which findings of fact and conclusions of law are authorized by Rule 52. *See Hamilton Foundry & Mach. Co.* v. *International Molders & Foundry Workers Union*, 193 F.2d 209, 213 (6th Cir.), *cert. denied*, 343 U.S. 966 (1952); *cf. O'Brien* v. *Westinghouse Elec. Corp.*, 293 F.2d 1, 8 (3d Cir. 1961) (findings of fact not necessary in granting a motion for a directed verdict).

We note however, that in our opinion, it is the better practice in cases such as the instant case, in which the facts are complex, for a trial court to delineate with specificity its reasons for the grant of judgment n.o.v. rather than merely stating conclusively, as did the District Court here, that there was no substantial evidence to support the jury's verdict. By setting forth its reasons for granting judgment n.o.v., the trial court aids both the parties on appeal and the appellate court in their review of the evidence.

I

NCR is engaged in the production of business machines. Prior to 1972, almost one-half of its work force was employed in its facilities at its headquarters in Dayton, Ohio. During the early 1970's, the products of NCR changed from mechanical business machines to electronic business machines. The Company in 1972, in conjunction with this change in product line and therefore in production operations, embarked upon a "decentralization program" designed to reduce the level of operations at its Dayton facilities. The reductions in its work force which occurred in Dayton as a consequence of decentralization decreased the number of employees there from a peak of approximately 21,000 in 1970 to around 8000 at the time of trial.

Prior to 1964, almost all of NCR's Class "D" employees in the Dayton facilities were in a single collective bargaining unit, represented for purposes of collective bargaining, by the NCR Employees Independent Union of Dayton, Ohio (Union). The National Labor Relations Board (NLRB) in 1964, ordered that this bargaining unit be divided into two bargaining units, namely, an "office and technical employees" bargaining unit and a "production and maintenance employees" bargaining unit. The Union continued as the collective bargaining representative of both units. Plaintiffs, because of the jobs they then held, became members of the office and technical employees' bargaining unit.

The seniority system applicable in 1972 to NCR's office and technical personnel, was derived from collective bargaining agreements entered into between the Company and the Union in 1964 and 1968. That system was based on the concept of vocational seniority. Pursuant to that concept, all of the jobs within the office and technical employees' bargaining unit were divided or grouped into vocational classifications. Seniority accrued by vocation. An employee acquired seniority upon the completion of six months, continuous service with the Company. An employee's seniority

in his vocation was equal to the total amount of his continuous service with NCR. Upon transfer to a new vocation, an employee's seniority in his previous vocation immediately carried over to his new vocation so that his seniority in the vocation to which he was transferred was equal to his total seniority.

Layoffs were conducted on a departmental basis. An employee's seniority gave him certain displacement or "bumping" rights in the event his department was faced with a reduction in its work force. In the event of a reduction in the work force of a department, an employee could not be laid off unless he was the least senior in terms of service in his vocation in that department. An employee laid off in one department had the right to bump an employee with the least seniority in his vocation in the entire bargaining unit.

However, when the laid-off employee had the least seniority in his vocation in the bargaining unit, he still possessed what was known as "time increment bumping" rights. Those rights entitled him to bump an employee having no seniority (i.e., with less than six months' continuous service with the Company) in any other vocation within the bargaining unit and whose job he could perform. If there were no such person, the laid-off employee could displace an employee in any other vocation with six months' to one year's seniority provided he could perform the work. In the event there were no persons in the bargaining unit with six months' to one year's seniority that the laid-off employee was qualified to replace, he could be assigned by the Company to bump an employee whose job he could perform, having one year's to two years' seniority, then two years' to three years' seniority, and so on until all the remaining office and technical employees had more senioritiy than such laid-off employee. However, the laid-off employee was required to bump the employee with the least seniority whose job he could perform.

Plaintiffs, as of October 13, 1972, were all in the vocational classification known as Senior Developmental Electronics Technicians (senior tech). Another classification of elec-

tronics technicians, denominated Developmental Electronics Technicians also existed at that time.[6] These two vocational classifications were created by the 1964 collective bargaining agreement. Prior to that agreement, NCR had but a single classification of electronics technicians and it was the 1964 agreement which provided that electronics technicians already employed by NCR became "senior techs." That agreement further created the new vocational classification of electronics technicians, namely, the junior techs. The classifications were to distinguish between electronics technicians on the basis of skill, ability, and experience. Four of the plaintiffs, (Morelock, Evans, Metcalf and Saunders) were electronics technicians in 1964 and were made senior techs in 1965 when the 1964 agreement became effective. The remaining plaintiff (Borgerding) became a junior tech in 1967 and a senior tech in 1970.

Because both the senior tech and junior tech vocational classifications were in the Research, Development and Engineering Area (RDE Area) as defined by the 1964 collective bargaining agreement, a senior tech laid off from his vocation in a reduction in the work force in his department, could potentially bump back into the junior tech vocation.[7] The

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[6] Developmental Electronics Technicians were referred to as "junior techs" by NCR's Dayton employees. Hereinafter, we also will use that designation.

[7] The 1964 collective bargaining agreement provided that employees in the RDE Area who were laid off from their vocations could bump back into prior vocations in which they had worked in the RDE Area. Thus, a laid-off senior tech who had been a junior tech prior to becoming a senior tech, could bump back into the junior tech vocation provided he had more seniority than the junior tech with the least seniority.

Plaintiffs maintain that the 1964 agreement permitted all senior techs to bump back into the junior tech vocation when they were laid off because one had to be a junior tech prior to becoming a senior tech. Although a statement made by Borgerding on redirect examination supports this position (App. at 665-666), we note that only one of the plaintiffs had been a junior tech prior to becoming a senior tech, namely, Borgerding. The other plaintiffs were all electronics technicians at the time the 1964 agreement became effective and were reclassified as senior techs at that time. There is no evidence other than the opinions of these plaintiffs that they, never having been junior techs, could have bumped into the junior tech vocation under the 1964 agreement. The collective bargaining agreement as we read it, does not so provide. Nevertheless, the effect of the elimination of the right of RDE Area employees to bump back into prior vocations in which they had worked, did work to effectuate a complete segregation between the senior and junior tech vocations by eliminating the rights of senior techs (including Borgerding) who had been junior techs, to revert to that position when they were laid off as senior techs.

1968 collective bargaining agreement, although retaining the two electronics technicians' vocations, made radical changes in the method of acquiring seniority in one's vocation. One of the changes eliminated the right of RDE Area employees laid off from their vocation to bump back to vocations in which they had previously worked in the RDE Area and thereby, for all practical purposes, prevented a laid-off senior tech from reverting to the junior tech vocation in the event of a reduction in NCR's work force.

As a result of a petition filed with the NLRB in 1971, a decertification election was conducted by the NLRB in which a majority of the employees of the office and technical bargaining unit voted to have no collective bargaining agent represent them. During the period prior to the election, NCR had sent letters to all its office and technical employees advising them that in the event the vote resulted in no union representation, the Company would continue to use, among other things, the seniority system established by the 1968 collective bargaining agreement for purposes of determining those workers to be laid off.

In accordance with this assertion, after the decertification of the Union, NCR issued an employee's handbook covering its employment practices for its Dayton office and technical personnel, continuing the seniority provisions of the 1968 collective bargaining agreement, for purposes of layoffs. There were however, minor changes in the time increment bumping rights. Thus, for all practical purposes, the seniority

system derived from the 1964 and 1968 collective bargaining agreements was the seniority system used by NCR to effectuate its decentralization.

It was stipulated at trial that between October 13, 1972 and June 26, 1973, many electronics technicians in both categories were laid off for lack of work, as part of a general large scale reduction in work force at the Dayton facilities. These reductions in the work force were accomplished in exact accordance with the seniority system. Laid-off senior techs were unable to bump into the junior tech vocation because of the division of electronics technicians into two vocational classifications and because of the elimination of the right of RDE Area employees, laid off from their vocations, to bump back to prior vocations in the RDE Area. In the proces of layoffs, the five plaintiffs were affected as follows:

(1) Hubert Morelock lost his position as a senior tech on June 25, 1973, having had the least seniority in that vocation at that time. Upon notification of the layoff, he was sent to the employment office where his time increment bumping rights were used to place him in the position of an order proofreader in the Manual Clerk's vocation. Approximately three months later, Morelock began a one-year sick leave. In September 1974, he retired as totally and permanently disabled.

(2) Eugene Borgerding was laid off as a senior tech on June 25, 1973. The application of his time increment bumping rights placed him in a job as a copy machine operator in the Duplicating Equipment Operators and Clerks vocation. Seventeen weeks later, he was recalled to his former position as a senior tech.

(3) William Evans was never laid off. Instead, he transferred from his position as a senior tech in the Dayton facilities to a position as a senior tech at NCR's Miamisburg, Ohio facility.

(4) Clayton Metcalf did not lose his job as a senior tech. Instead, he was shuffled from one department to another, as he

bumped other senior techs with less seniority. However, at the time of the suit, he had the least seniority among the remaining senior techs and therefore would be the next senior tech laid off.

(5) Ralph Saunders lost his position as a senior tech on March 26, 1973, because he was the least senior in that vocation at that time. The implementation of his time increment bumping rights placed him in a position as a mail sorter in the Manual Clerk vocation. In December 1973, he transferred to NCR's Miamisburg facility as a lab aid. After becoming a junior tech at Miamisburg, Saunders, on October 19, 1974 regained his position there as a senior tech.

II

NCR advances two arguments which it asserts eliminates the necessity for this Court to reach the merits of this appeal. First, it maintains that the District Court erred in denying NCR's motion to dismiss plaintiffs' action as time barerd under § 7(e) of the ADEA, 29 U.S.C. § 626(e), which incorporates the limitations periods (§ 6) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255. Pursuant to that latter section, suit must be commenced within two years from the date of the discriminatory occurrence. An additional year is added when the discrimination is found to be willful, extending the time limit to three years.

NCR argues that because the essence of plaintiffs' cause of action is the allegation that the Company's seniority system discriminates against NCR employees on the basis of age, plaintiffs' cause of action accrued in 1968, the date when the seniority sytem in effect at the time of the 1972 reductions in force was first adopted. Thus, even if the three-year statute of limitations applicable to willful violation of the ADEA is the appropriate limitations period on the facts of this case, NCR concludes that plaintiffs' action is time barred because plaintiffs did not commence suit until March 4, 1974, more than

three years after the adoption of the alleged discriminatory seniority system. We disagree with this contention.

The adoption of NCR's argument would in effect, emasculate § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), which proscribes the observance of non-bona fide seniority systems. To accept NCR's argument would permit perpetual age discrimination through a seniority system by an employer whose violation had already continued without attack for three years. Thus, for example, an employee hired more than three years after the implementation of a seniority system could never challenge its validity.

We hold that the adoption of a seniority system, if discriminatory as to age, constitutes a continuing violation of the ADEA as long as that system is maintained by the employer. An employee's cause of action for an alleged act of age discrimination caused by a discriminatory seniority system, does not accrue until his employment opportunities are adversely affected by the application to him of the provisions of that seniority system. Thus in the instant case, plaintiffs' cause of action accrued at the time the plaintiffs were laid off from their positions as senior techs. The present action was commenced well within even the two-year limitation period (for non-willful violations of the ADEA).

NCR secondly maintains that the District Court erred in failing to dismiss plaintiffs' action on the ground that plaintiffs failed to file written consents to be parties to the lawsuit as required by 29 U.S.C. § 256. Section 256 is not incorporated by reference into the ADEA, and therefore we fail to see how it could be applicable to age discrimination suits. We note however, that 29 U.S.C. § 216(b) is incorporated by reference into the ADEA, 29 U.S.C. § 626(b), and provides in pertinent part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No em-

> ployee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The consent requirement of § 216(b), like that of § 255 is apposite solely to representative actions. Plaintiff's complaint states a separate cause of action for each named plaintiff. Individual relief is sought for each of the plaintiffs. No plaintiff purports to represent anyone other than himself. As this is not a representative suit, there was no need for plaintiffs to have filed "consent[s] in writing." *Wallace* v. *Water Tank Service Co.*, 256 F.Supp. 689, 690 (W.D. Okla. 1966); *Mitchell* v. *Mace Produce Co.*, 163 F.Supp. 342, 346-47 (D. Md. 1958); *MacDonald* v. *Martinelli*, 120 F.Supp. 383 (S.D.N.Y. 1950); *Deley* v. *Atlantic Box & Lumber Corp.*, 119 F.Supp. 727, 728-29 (D.N.J. 1954).

III

The District Court in its order granting NCR's motion for judgment n.o.v., set forth the standard for determining whether judgment n.o.v. should be entered, as follows:

> The standard of inquiry in this circuit is the "substantial evidence" rule. *Solomon* v. *United States*, 276 F.2d 669 (6th Cir. 1960); *Hinton* v. *Dixie-Ohio Express Co.*, 18[8] F.2d 121 (6th Cir.); *Scott* v. *United States*, 161 F.2d 1009 (6th Cir.).
>
> It is clear from the above authorities that the motions must be overruled unless viewing the evidence in the light most favorable to the plaintiff there would be no substantial evidence to support a jury verdict.

Applying that test, the Court concluded:

> A consideration of the evidence presented indicated that three of the plaintiffs, Hubert Morelock, Eugene Borgerding, and Ralph Saunders, were reduced in grade

> in reverse order of seniority during a reduction in force at defendant's plant. Plaintiffs Clayton Metcalf and William Evans were never reduced in rank. No substantial evidence, in this Court's opinion, was presented supporting plaintiffs' contentions of a violation of the Age Discrimination in Employment Act. 29 U.S.C. § 621 *et seq.* There being a lack of substantial evidence, the motion for judgment non obstante veredicto is hereby GRANTED.

Plaintiffs first maintain that the District Court applied an incorrect standard in granting judgment n.o.v. The plaintiffs argue that because the word "substantial" connotes equally well either a qualitative or a quantitative meaning, the trial court's formulation of the test for determining whether to enter judgment n.o.v., evinces an improper weighing of the evidence by that court. We do not agree.

The standard to be applied in determining the propriety of entering judgment n.o.v. has been articulated in many ways. *Simblest* v. *Maynard*, 427 F.2d 1, 4 (2d Cir. 1970); *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969); 5A Moore's Federal Practice, ¶ 50.02[1], at 50-25 (2d ed. 1977); 9 Wright & Miller, Federal Practice and Procedure § 2524, at 545-47 (1971).

A number of decisions of this Court[8] as well as other Courts of Appeals[9] have stated that a motion for judgment n.o.v. must be granted unless there is "substantial evidence" in opposition to it. We agree with plaintiffs that the preferred formulation of the test for granting judgment n.o.v. is the so-called

[8] *See e.g., Taylor* v. *Cirino*, 321 F.2d 279, 281 (6th Cir. 1963); *Solomon* v. *United States*, 276 F.2d 669, 672 (6th Cir.), *cert denied*, 364 U.S. 890 (1960); *Hinton* v. *Dixie Ohio Exp. Co.*, 188 F.2d 121, 124 (6th Cir. 1951) (directed verdict).

[9] *See e.g., Fontana Aviation, Inc.* v. *Beech Aircraft Corp.* 432 F.2d 1080, 1084 (7th Cir. 1970); *Business Dev. Corp. of N.C.* v. *United States*, 428 F.2d 451, 453 (4th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Boeing Co.* v. *Shipman*, *supra*, 411 F.2d at 373-77.

"reasonable minds" test.[10] Yet, in light of the precedent supporting the standard used by the District Court, and in view of the fact that there is no evidence on the record which indicates that the trial judge weighed the evidence, we find no prejudicial error. As stated by a leading authority on federal civil procedure:

> Although . . . courts have used other phrases than the one preferred here [namely, the reasonable minds test] to describe the standard of sufficiency of evidence, it is unlikely that there is any real difference in result.

Wright & Miller, *supra* § 2524, at 547. [Footnote omitted].

Plaintiffs next argue that even if the District Court used a proper standard in determining the sufficiency of the evidence, it erred in granting judgment n.o.v. on the facts of this case.

The issue raised by a motion for a judgment n.o.v. is whether there is sufficient evidence to raise a question of fact for the jury. *O'Neill* v. *Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). This determination is one of law to be made by the trial court in the first instance. *Id.* In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. *See Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a

[10] This test has been phrased by this Court as follows: "[A] judgment n.o.v. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence." *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (1975), *cert. denied*, 424 U.S. 913 (1976).

different conclusion, then the motion should be granted. *Id.* at 109; *Reeves* v. *Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973); 9 Wright & Miller, Federal Practice and Procedure § 2524 (1971). An appellate court when reviewing the trial court's decision is bound by the same standard. *Gillham* v. *Admiral Corp., supra,* 523 F.2d at 109; *O'Neill* v. *Kiledjian, supra,* 511 F.2d at 513.

The ADEA covers persons between the ages of 40 and 65 years of age[11] and makes it unlawful, *inter alia,* for an employer to:

> limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . . .

29 U.S.C. § 623(a)(2).

It is further provided in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), that it is not unlawful for an employer to "observe the terms of a bona fide seniority system . . ., which is not a subterfuge to evade the purposes of this chapter . . . ."

Although not clearly articulated in their briefs on appeal, plaintiffs appear to assert two arguments. First, they apparently maintain that the evidence establishes that NCR's seniority system is not bona fide because the purpose and effect of the creation of two separate classifications of electronic technicians was to create classifications of electronic technicians based solely on age. Plaintiffs further appear to argue that even if the seniority system is bona fide, the evidence shows that NCR used it as a subterfuge to effectuate age discrimination against plaintiffs in the 1972-1973 reductions in force.

[11] In the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12(a), 92 Stat. 189 (1978), Congress extended the upper age limit of the ADEA to 70. This change becomes effective on January 1, 1979.

We turn first to the question of whether NCR's seniority system was bona fide. When the evidence is viewed in a light most favorable to the plaintiffs, we are unable to find any evidence which supports a conclusion that the seniority system is not bona fide.[12]

First, the division of NCR electronics technicians into two separate and distinct vocational classifications for purposes of seniority was the result of collective bargaining negotiations conducted between the Company and the Union. The separation commenced by the terms of the 1964 collective bargaining agreement which created the two electronics technicians categories, and was consumated by the 1968 collective bargaining agreement which eliminated the right of RDE Area employees who were laid off, to bump back into prior vocations in which they formerly worked in the RDE Area. There is no evidence in the record which supports a conclusion that either the creation of the two classifications of electronics technicians or the elimination of the rights of senior techs to bump junior techs had their origin in or were maintained for the purpose of age discrimination. To the contrary, the uncontroverted evidence in this case shows that the motive for the creation of two electronics technician vocations was economic, that is, to permit NCR to hire inexperienced technicians at a lower salary than that paid to experienced electronics technicians already in the employ of the Company. The classifications were based not on age, but on skill and ability. App. at 298, 316, 346-47.

There is simply no evidence in the record which indicates a reason for the change by the 1968 collective bargaining agreement, of the bumping rights of the RDE Area employees. Plaintiffs maintain that the testimony of their expert witness, Thomas Nisbet, demonstrates that NCR knew as early as 1964

[12] Plaintiffs do not assert that NCR's seniority system is not bona fide in the sense that it is not authentic or genuine. The evidence is uncontroverted that NCR did have a seniority system and that it literally followed that system in implementing its reduction in force.

of the need for decentralization (with its attendant reduction in force) of its operations at its Dayton facilities. From this fact, plaintiffs argue that the jury was entitled to infer that the alterations in bumping rights effected by the 1968 agreement were made in order to isolate older electronics technicians in the senior tech vocation. However, the record is devoid of any such prescience on the part of NCR. Nisbet's testimony refers to a speech made by one of NCR's department heads, not in 1964 or in 1968 but *in 1974* and dealt with the Company's policies as they existed in 1974. App. at 435-37. In fact, the only evidence in the record shows that the Company was hiring workers during the period between 1964 and 1971, App. at 534, 573, 586, and that decentralization commenced in 1972. App. at 589.

Plaintiffs further point to the fact that the use of the adjectives "senior" and "junior" to describe both the two classifications of electronics technicians and other job classifications is indicia of age discrimination. We do not agree. These words when used in connection with a job description connote job duties and responsibilities rather than age. *See Hodgson* v. *Approved Personnel Service, Inc.*, 529 F.2d 760, 765 (4th Cir. 1975).

Secondly, the uncontroverted evidence shows that there were actual differences between senior and junior techs. The former are more skilled, have greater ability and are expected to exercise more independence and creativity than the latter. In addition, senior techs are expected to assist junior techs when the latter have problems on the job. Senior techs were also paid more than were junior techs.

Plaintiffs' expert witness, Thomas Nisbet, testified that the pay levels of the technical jobs at NCR could be broken down into a point rating system. Under that system, the senior tech vocation was rated at a higher level than the junior tech vocation. Nisbet further testified.

> "Q. In totaling the points to make a job evaluation, is age a factor?

> "A. No, sir, you don't consider the employee at all when you are evaluating jobs. The employee is considered under a merit rating, the individual merit rating system. The job evaluation program is set up to set a value, an equitable value on each specific job so that you pay one job fairly in relation to the other.
>
> "Q. But age is not a factor.
>
> "A. Age is not a factor when you set jobs. . . ."
>
> (App. 454-55)

Thus, the evidence established the fact that the dual classifications of electronics technicians was based on criteria other than age, that is, skill and ability. This is in our opinion, a reasonable and proper means of employee classification.

Thirdly, it is undeniable that NCR's seniority system is facially neutral, that is, its terms do not discriminate on the basis of age. The seniority system applies equally to all senior techs. No senior tech regardless of age, when he is laid off from the vocation, is permitted to bump a junior tech. Moreover, neither the seniority system nor the employment policy of NCR requires an employee to be a specified age in order to be either a senior or junior tech.

Fourthly, the evidence does not establish that the seniority system effectuated a classification of senior techs by age. At all times there were persons in each vocation who were under the age of forty, as well as those who were forty years of age and older.

Borgerding for example, did not become a junior tech until he was 42 years of age. In 1971, three of the 29 junior techs were under the age of 40. On June 1, 1974, eleven of the 18 junior techs were 40 years of age or older. Similarly, there always were persons both protected by and unprotected by the ADEA in the senior tech vocation. For example, during the period between October 13, 1972 and June 26, 1973, 21 senior techs were laid off, fourteen of whom were under the age of forty.

In light of these facts we do not believe that there is even

a scintilla of evidence to support a conclusion that NCR's seniority system is not bona fide.

Furthermore, in our opinion, the evidence when viewed in a light most favorable to plaintiffs, was insufficient to justify submitting to the jury the issue whether NCR maintained the seniority system as a subterfuge to avoid the provisions of the ADEA.

In *United Airlines, Inc.* v. *McMann*, 434 U.S. 192 (1977), the Supreme Court defined the meaning of "subterfuge" as used in the ADEA as follows:

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense.

Id. at 203.

Plaintiffs noted that NCR laid off a larger number of senior techs who also had a higher average age than junior techs, despite the facts that (1) senior techs did substantially the same work as junior techs; (2) senior techs were purportedly more skilled and able than junior techs; and (3) NCR was changing its products line from mechanical business machines to electronic business machines. This reduction resulted in there being employed at the Dayton facility six senior techs, all of whom were over 40 years of age and 14 junior techs. Uncontroverted facts in Final Pretrial Order, App. at 71-72. From this reduction in work force, plaintiffs argue that the jury could reasonably infer that NCR used the separate classification of electronics technicians to rid itself of its older workers.

Plaintiffs reinforce this argument by pointing to three factors which they maintain indicate an age animus on the part of NCR, namely: (1) the fact that Morelock was once turned down for a transfer because a manager felt that at 43 years of age he was too old; (2) the fact the Company had a mandatory retirement program under which employees upon becoming age 62 years were the "subjects of 'special' managerial scrutiny and evaluation," (Plaintiff's Brief at 29); and (3) the fact that pension costs were higher for older workers.

We are unable to accept plaintiffs' contention for two reasons. First, plaintiffs entered into the following stipulation:

> (24) That, during the period commencing October 13, 1972, and ending June 26, 1973, a reduction in force occurred within the Office-Technical Employees Unit described in Paragraph 14, which reduction affected the employees in Vocation 39820–Senior Development Technician. Effective on June 26, 1973, there were six employees working in Vocation 39820–Senior Development Technician, the following employees with the noted seniority and birthdates having been *reduced from such vocation during this period due to lack of work within such vocation.* [Emphasis added]

Uncontroverted Facts in Final Pretrial Order, App. at 71.

A party is bound by what he stipulates. The above stipulation gives the reason why plaintiffs were laid off, namely, there was no work for senior techs. This stipulation in our opinion, should preclude the plaintiffs from claiming that they were laid off for any other reason.

Moreover, even if this stipulation were not as conclusive as we believe it to be, we hold that on the uncontroverted facts of this case, there was no evidence to raise a factual issue to submit to the jury the question whether the seniority system was employed to effect age discrimination. We do not believe that the number of senior techs laid off is so excessive in comparison with the number of junior techs laid off as to conclude that NCR, in laying off its electronics technicians, was discriminating on the basis of age.

The District Court properly entered judgment n.o.v. There is no need for us to discuss the issues raised with respect to its grant of NCR's motion for a new trial.

AFFIRMED.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 77-172

HUBERT MORELOCK, et al.,
Petitioners,

v.

NCR CORPORATION.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of United States Court of Appeals in this cause is vacated with costs; and that this cause is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Lorillard* v. *Pons*, 434 U.S. — (1978).

It is further ordered that the petitioners, Hubert Morelock et al., recover from NCR Corporation One Hundred Dollars ($100) for their costs herein expended.

March 6, 1978

Clerk's costs $100

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-2-74-29

HUBERT MORELOCK, et al.,
Plaintiffs,

v.

THE NCR CORPORATION,
Defendant.

JUDGMENT

(Filed 4-16-75)

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that the defendant, National Cash Register Company, motion for judgment non obstante veredicto and motion for a new trial is hereby GRANTED. The motion for a new trial is granted conditioned upon the vacation or reversal of this Court's order granting the motion for judgment non obstante veredicto.

The plaintiffs take nothing, that the action be dismissed on the merits.

Dated at Dayton, Ohio, this 16th day of April, 1975.

John D. Lyter,
Clerk of Court
By Rebecca Jane Ellis

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action File No. C-2-74-29

HUBERT MORELOCK, ET AL.,
Plaintiffs,

v.

NATIONAL CASH REGISTER COMPANY,
Defendant.

ORDER GRANTING MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO AND MOTION FOR A NEW TRIAL

(Filed 4-16-75)

This matter is before the Court following trial on the issue of liability to a jury and upon motion by defendant properly made for judgment non obstante veredicto and for a new trial.

The standard of inquiry in this circuit is the "substantial evidence" rule. *Solomon* v. *United States,* 276 F.2d 669 (6th Cir. 1960); *Hinton* v. *Dixie-Ohio Express Co.,* 181 F.2d 121 (6th Cir.); *Scott* v. *United States,* 161 F.2d 1009 (6th Cir.).

It is clear from the above authorities that the motions must be overruled unless viewing the evidence in the light most favorable to the plaintiff there would be no substantial evidence to support a jury verdict.

A consideration of the evidence presented indicated that three of the plaintiffs, Hubert Morelock, Eugene Borgerding,

and Ralph Saunders, were reduced in grade in reverse order of seniority during a reduction in force at defendant's plant. Plaintiffs Clayton Metcalf and William Evans were never reduced in rank. No substantial evidence, in this Court's opinion, was presented supporting plaintiffs' contentions of a violation of the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 et seq. There being a lack of substantial evidence, the motion for judgment non obstante veredicto is hereby GRANTED.

Defendant seeks also a new trial, urging that irrelevant and immaterial evidence and testimony was presented through defendant witness Thomas Nesbitt. A consideration of Mr. Nesbitt's testimony and Plaintiffs' Exhibit 22 leads to the conclusion that such testimony and exhibit were improperly admitted to the prejudice of defendant. Accordingly, defendant's motion for a new trial is likewise GRANTED.

The procedure to be followed in a determination of this sort may be found in Rule 50(c) of the Federal Rules of Civil Procedure. Accordingly, the motion for a new trial is granted conditioned upon the vacation or reversal of this Court's order granting the motion for judgment non obstante veredicto.

IT IS SO ORDERED.

Carl B. Rubin
United States District Judge

APPENDIX F

PLAINTIFF'S EXHIBIT 20
C-3-74-29

JOB DESCRIPTION 32020
EFFECTIVE 3-1-65

ELECTRONICS DEVELOPMENT TECHNICIAN

Nature and Purpose of Work

Incumbents at this level assist in electronic development and laboratory work by building, assembling, testing, reworking, and troubleshooting electronic equipment utilizing established practices and procedures and an extensive practical knowledge of basic electronic theory.

Typical, but not all-inclusive, are the following duties:

1. Works from blueprints, logical diagrams, schematic diagrams, and verbal instructions in making breadboard and prototype layouts of electronic configurations for experimental or developmental purposes.
2. Builds, assembles, installs, and wires units using judgment in choosing proper wire size, selecting hardware such as cables, connectors, etc., and in properly positioning components in order to keep noise at a minimum.
3. Checks out experimental or developmental units by checking specified values at various points in the circuitry; locates wiring errors, improper placement of components, faulty components such as condensers, transistors, and resistors of improper value.
4. Isolates more complex design errors and communicates the same to higher level personnel for resolution.

5. Following procedural outlines, schematic diagrams, prints and generally accepted practices and procedures, tests and performs functional checkouts of uncomplicated prototypes and models.
6. May be required to correct functional maladjustments of test equipment or to devise, assembly, or modify procedures and knowledge of the test to be performed. same for specific application working from established
7. Uses a full range of test equipment such as bench supplies, metering equipment, voltmeters, ammeters, bridges, oscilloscopes, potentiometers, and electrical recording equipment.
8. Prepares verbal and/or written reports of tests and work performed.
9. In the course of carrying out the regular technical duties, may, on an occasional or incidental basis, make or modify parts utilizing machine tools such as the drill press, lathe, pedestal grinder, saw, and sander, and where the work performed is not normally described as precision-like in nature.

Supervision or Direction Received

Assignments are specific. Work is performed under the direction of engineers or higher level technicians within established practices, procedures, and theories of electronic assembly and testing operations.

Qualifications

Requires an extensive knowledge of basic electronic theory, of laboratory and testing practices, and of electronic test equipment and its application.

APPENDIX G

PLAINTIFF'S EXHIBIT 21
C-3-74-29

CLASSIFICATION NO. 3 2052
NCR CLASS D
EFFECTIVE 3-1-65

SENIOR ELECTRONICS DEVELOPMENT TECHNICIAN

Nature and Purpose of Work

Work at this level involves the independent application of subprofessional and advanced technical knowledge of electronics. Assignments are of such a nature as to require independent technical judgment and creative liability. Requires the ability to work independently from general engineering information and design criteria in constructing, modifying, testing, reworking, and troubleshooting complex electronic systems and instrumentation.

Typical, but not all-inclusive, are the following duties:

1. Works from own knowledge of pertinent logic circuitry, the theory and application of the electronic functioning involved, component values, functional check out methods, the use and limitations of test equipment, as well as from schematic, logic circuitry, verbal instructions, and prints.
2. Collaborates with engineers in developing the physical layout and arrangement of unit or system designs by determining details of construction required; building breadboard models and prototypes; testing, modifying, and adjusting circuits, components, or system until design specifications and performance are verified.

3. Devises, generates circuitry for, and constructs specialized test equipment (requiring a thorough practical knowledge of electronic theory and the test requirements) for component and sub-assembly evaluation and for specific application on more complex electronic equipment.
4. Performs critical unit and systems debugging on early development models.
5. Tests and performs functional check outs of complex prototype or experimental systems for which standard procedures are not established, and, under general direction, dismantles, takes corrective measures necessary, re-assembles, and retests same.
6. May direct the activities of, and supply technical information, sketches, and diagrams to other technician or assemblers engaged in the actual fabrication, construction, assembly, and testing of electronic systems.
7. May plan the sequence of operations and the methods required to completely lay out, fabricate, assemble, package, and test complex electronic units and systems.
8. Prepares verbal and written reports of tests and work performed including preliminary analysis of data and recommendations based on test findings.
9. In the course of carrying out the regular technician duties, may, on an occasional or incidental basis, make or modify parts utilizing machine tools such as the drill press, lathe, pedestal grinder, saw, and sander, and where the work performed is not normally described as precision-like in nature.

Supervision or Direction Received

Carries out broad assignments working in conjunction with engineers or supervisory personnel. Requires a high degree of initiative to act independently and accurately execute instructions in the performance of assigned projects.

Qualifications

Requires a thorough and extensive practical knowledge of electronic theory and associated mathematics; a knowledge of the theory, operation, use and limitations of a complete range of electronic test equipment; and the capacity for independent technical judgment and original thinking.